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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF CALEXICO,

Plaintiff and Respondent,

v.

JOSE M. RODRIGUEZ AND MARTHA S.  
RODRIGUEZ,

Defendants and Appellants.

D073505

(Super. Ct. No. ECU08939)

APPEAL from an order of the Superior Court of Imperial County, L. Brooks  
Anderholt, Judge. Affirmed.

Terry Singleton for Defendants and Appellants.

Best Best & Krieger and Bruce W. Beach for Plaintiff and Respondent.

Jose M. and Martha S. Rodriguez (the Rodriguezes) appeal from the trial court's order granting a new trial following a jury trial in an eminent domain action to determine amount of compensation the City of Calexico (the City) was required to pay to the Rodriguezes to compensate them for the City's plan to acquire, in a road widening project, a strip of land in front of a building owned by the Rodriguezes. The jury found

that the total amount of compensation due to the Rodriguezes was \$262,775.00, including \$235,000 in severance damages resulting from the decrease in market value of the building due to the City's acquisition of the land in front of it. The trial court granted a new trial based on its conclusion that the amount of severance damages awarded by the jury was excessive. As we will explain, we conclude that the trial court did not abuse its discretion in granting a new trial based on excessive damages. We accordingly affirm the order.

## I.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The City's Acquisition of a Portion of the Rodriguezes' Property Through Eminent Domain*

The Rodriguezes own an approximate 27,000 square foot building on the corner of Cesar Chavez Boulevard and West Fifth Street in Calxico (the Building), on a 55,756 square foot lot (or 1.28 acres), which they bought as an investment in 2003 for \$550,000. The Building is comprised of 22 individual units, 20 of which are warehouse storage spaces with roll up doors that the Rodriguezes rent to tenants on a month to month basis at a current rate of 44 cents per square foot. At the time of trial, several of the warehouse units were vacant. The two units that front Cesar Chavez Boulevard are improved to rent as office/commercial space, and together they comprise approximately 3000 square feet. Although at the time of trial, the two office/commercial units were vacant, the units had previously been rented to tenants for use as a chiropractor's office, a furniture store, and an auto parts store. According to Ms. Rodriguez, who handles financial matters for the

Building, the office/commercial units are being offered for rent at 57 cents per square foot.<sup>1</sup> Currently, there are eight parking spaces on the property in the front of the Building fronting Cesar Chavez Boulevard, which provide necessary parking for the office/commercial units.

As part of a project to widen and improve Cesar Chavez Boulevard, the City is using its eminent domain power to acquire a strip of land approximately 149 feet wide and 20 feet deep (totaling 2,988 square feet) located between the Building and Cesar Chavez Boulevard. As part of the same project, the City is also acquiring (1) a strip along the front of the property, totaling 256 square feet, for a permanent slope easement; and (2) a temporary construction easement of 492 square feet to accommodate the City's equipment during construction. After the City's acquisition, the Building will be located approximately seven feet from the property line, and the eight parking spaces that are currently in front of the Building will be eliminated. The Rodriguezes will no longer be able to use the two units in the front of the Building as office/commercial space because insufficient parking will be available. Further, the Building will no longer conform to the

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<sup>1</sup> There was conflicting information at trial about the applicable rental rate for the office/commercial space. Mr. Rodriguez, who does not handle the financial matters for the building, testified during his deposition that he thought the office/commercial units and the warehouse units rent at the same price per square foot, but at trial stated that the office/commercial units rent for more than the warehouse units and said his deposition testimony was a mistake. The City's own valuation expert performed an income capitalization valuation of the building by assuming that the fair market rental value of the warehouse units was 40 cents per square foot and that the fair market rental value of the office/commercial units was higher, at 50 cents per square foot. The rental history of the building presented at trial showed that the office/commercial units historically rented at a higher rate per square foot than the warehouse units.

setback requirement of 15 feet from the street, but the Building will be permitted to remain with that reduced setback as a lawful nonconforming use unless it is significantly rebuilt, remodeled or left vacant for an extended period.

B. *The Eminent Domain Litigation and the Jury's Verdict*

After the Rodriguezes rejected the City's offer to acquire the real property interests for \$61,900, the City filed a complaint in eminent domain against the Rodriguezes. At trial, the Rodriguezes did not dispute the City's right to acquire the real property interests, but they disagreed on the amount that would fairly compensate them for the taking.

As argued to the jury, the amount of compensation that the Rodriguezes were entitled to receive from the City was broken into three subparts, which were set forth in three separate lines on the verdict form.

The first item of damages was the fair market value of the property that was being taken in the acquisition of the 2,988 square feet strip of land and the 256 square feet slope easement in front of the Building. The Rodriguezes' expert witness, appraiser Randy A. Tagg, opined that the slope easement and the 2,988 square foot acquisition together had a fair market value of \$19,310. The City's expert witness, appraiser Steve Parent, opined those real property interests had a fair market value of \$12,069. When opining on fair market value, the expert witnesses also included the depreciated value of the asphalt pavement on the strip of land to be acquired and the value of the eight concrete tire bumpers at the eliminated parking spaces. Tagg opined that the depreciated fair market

value of the asphalt was \$16,000 but did not value the tire bumpers.<sup>2</sup> Parent valued the asphalt at \$5,416, and valued the tire bumpers at \$273. The jury awarded a total of \$27,575 on the first item of damages, which was a value falling between the amounts presented by the two appraisers.

The second item of damages was the value of the temporary construction easement. The appraisers were very close in their valuation of that easement (\$200 for Tagg, and \$185 for Parent), and the jury awarded \$200.

The third item of damages—which is at issue in this appeal—consisted of the reduction in fair market value to the remainder of the Rodriguezes' real property as a result of the City's acquisition of the property in front of the Building. This category of damages is commonly referred to as "severance damages." Tagg and Parent did not agree on the approach to determining severance damages and, as a result, arrived at significantly different opinions. Tagg opined that severance damages (including \$5,000 in lost rent during construction) were \$255,141. Parent opined severance damages were \$52,949. The jury awarded severance damages of \$235,000. As the subject is central to

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<sup>2</sup> In their briefing, the City contends that Tagg did not depreciate the value of the asphalt and instead used the amount for new asphalt. We disagree. Tagg testified that he arrived at the depreciated value of the asphalt based on a contractor's statement to him that new asphalt would cost, *at a minimum*, \$5 per square foot. Tagg selected the value of \$5 per square foot as a depreciated value of asphalt that, when new, could have been *more* than \$5 per square foot. While the jury could have discounted Tagg's opinion because of his inexact depreciation methodology, we reject the City's contention that it was legally improper for the trial court to admit Tagg's opinion on the value of the asphalt. Tagg did not purport to testify that the fair market valuation should include the value of *new* asphalt.

the issues presented here, we now turn to a more detailed discussion of how Tagg and Parent reached their divergent opinions on the amount of severance damages.

1. *Tagg's Opinion on Severance Damages*

Tagg primarily used the sales comparison approach to arrive at his opinion of severance damages. As an initial step in his analysis, Tagg used market data from comparable sales to determine that, prior to the City's acquisition, the fair market value of the Rodriguezes' real property (including the land value and the Building value) was \$750,000.<sup>3</sup> Tagg then subtracted the fair market value of the land and asphalt being taken by the City (\$19,310 in land value and \$16,000 in asphalt value) to arrive at a value of \$714,690. Tagg next performed an analysis to determine that as a result of the City's acquisition of the land in front of the Building, the fair market value of the real property would decline by an additional 35 percent, from \$714,690 to \$464,549. As Tagg concluded, the diminution in value from \$714,690 to \$464,549 after the City's acquisition resulted in a severance damages figure of \$250,141.

Tagg provided some limited explanation of how he concluded that 35 percent was the amount by which the fair market value of the property was reduced due to the City's acquisition. First, Tagg located four pairs of comparable properties, with and without adequate parking, to show that the lack of adequate parking adversely impacts value. Tagg concluded that because the City's acquisition of the land in front of the Building will eliminate eight parking spaces needed for the office/commercial units, there would

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<sup>3</sup> In Tagg's opinion, the indicated value of the Building alone (without the land) before the acquisition was approximately \$378,000.

be a diminution in value of the Rodriguezes' property.<sup>4</sup> Tagg could not specify what portion of the 35 percent in diminution of value was caused by the loss of parking. Second, Tagg identified "[t]he building setback nonconformance issue," which he stated would "accelerate[] the building depreciation" and would therefore reduce the value of the Building in an unspecified amount. Third, Tagg stated that the acquisition would "negatively impact[] the highest and best use" of the Building. Specifically, before the City's acquisition, the Building could support a combination of commercial and industrial uses through the office/commercial units, but after the City's acquisition only industrial use was feasible for the Building. Fourth, Tagg stated that there was "some onerous easement language in the slope easement" that would diminish the value of the property.<sup>5</sup> Although Tagg's written summary of his conclusions also identified "diminished site circulation" as a factor that diminished the value of the property, at trial Tagg stated that "in terms of value it's not an issue" and explained that he was referring to the size of the driveways planned in the City's curb and sidewalk installation in front of the property. Finally, to his severance damages figure, Tagg also added \$5,000 based on his opinion

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<sup>4</sup> Related to the parking issue, Tagg also opined that eliminating parking spaces would create a problem with marketing the Building because it would be "more difficult to rent the spaces with fewer parking spaces."

<sup>5</sup> Regarding the "onerous easement language" Tagg was apparently referring to his belief that under the slope easement the City could elect to provide no access from Cesar Chavez Boulevard in that "the easement deed . . . says that they can take the abutter's right from Cesar Chavez Boulevard." However, based on the evidence at trial, it was undisputed that the City plans to install two driveways from Cesar Chavez Boulevard into the property.

that the Rodriguezes would lose at least that much in rent at the Building during the disruption caused by the City's road construction project.

At trial, Tagg also set forth an alternative valuation methodology which took into account "the cost to cure" the problems with the Building that would be created by the City's acquisition. Tagg explained that the analysis incorporating the cost to cure was performed only as a "check" on the results of his sales comparison methodology, and that it was a completely separate analysis. Tagg's alternative analysis was premised on a construction estimate provided by contractor James Duggins, who also testified at trial. According to Duggins, if he was to perform construction work to cure the loss of parking, the nonconforming set back, and the loss of office/commercial space caused by the City's acquisition, he would demolish approximately 2500 square feet of the front part of the Building where the office/commercial space is located.<sup>6</sup> He would then place parking spaces in the footprint of the demolished portion of the Building and would remodel the front portion of the remaining Building to contain two office/commercial units identical to those that were demolished. As a result, the Building would *lose* approximately 2500 to 3000 in rentable square footage, but it would once again have two viable office/commercial units and eight parking spaces in front of the Building. Duggins estimated that the construction would cost \$189,265, but at trial he also agreed that his estimate did not include "soft costs," overhead fees, or costs associated with other

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<sup>6</sup> Specifically, Duggins testified that Mr. Rodriguez asked him to prepare an estimate for construction "to make him whole."



contingencies. At trial Duggins agreed that the total cost for the construction with those amounts added would be approximately \$255,000.

Tagg used Duggins's estimate of construction costs to arrive at an opinion of what a buyer would pay for the Rodriguezes' property, after the City's acquisition, if the buyer intended to remodel the Building to implement Duggins's proposed construction project. Based on an assumption that a reduced-size building on the property with *sufficient* parking for office/commercial units, and *conforming* to the setback requirements, would have a value of \$734,400, Tagg used Duggins's construction cost estimate to arrive at the amount that a reasonable buyer would pay for the Building if the buyer had plans to remodel it. Subtracting \$255,000 in construction costs from the \$734,400 value of the property after the remodel, Tagg concluded a buyer would pay a rounded figure of \$480,000 to purchase the property. Tagg explained that the result of his alternative valuation analysis confirmed that he was "on the right track" in his conclusion that the property had a value of \$464,549 after the City's acquisition based on the sales comparison approach.

## *2. Parent's Opinion on Severance Damages*

The City's expert witness, Parent, took a different approach to appraising the loss of value due to the City's acquisition. Parent explained that because the Rodriguezes bought the property as an investment, and the property generates income through its multiple rentable units, the most appropriate valuation approach was based on the income

that the property could generate,<sup>7</sup> referred to as the "income" or "income capitalization" approach. To determine the property's value under an income capitalization approach, Parent had to make several preliminary determinations, including that warehouse units in the Building had a rental value of 40 cents per square foot, and the office/commercial units had a rental value of 50 cents per square foot. Under the income capitalization approach, Parent concluded that if the office/commercial units could still be rented for their intended use at 50 cents per square foot after the City's acquisition, the property would have a total value of \$719,242. However, if the office/commercial units were used instead as warehouse space after the City's acquisition (as necessitated by the loss of parking), that same space could be rented at 40 cents per square foot, producing a value under the income capitalization approach for the *entire* property, after the City's acquisition, of \$692,391. To arrive at the amount of severance damages, Parent calculated the difference between \$719,242 and \$692,391, which is \$26,852, and he also added the amount that it would cost to convert the office/commercial units to warehouse

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<sup>7</sup> Both Tagg and Parent testified that there are three accepted approaches to appraising value: (1) the sales comparison approach; (2) the income capitalization approach; and (3) the cost approach. These three expert valuation approaches are described in Evidence Code sections 816, 819 and 820. Tagg specifically rejected the income capitalization approach, explaining that the property "is not an investment grade property," and "the most likely market purchaser for an older industrial building like this is an owner/user."

space, which, based on expert testimony, was \$26,097.<sup>8</sup> This resulted in severance damages of \$52,949.

During Parent's testimony, he criticized Tagg's valuation analysis that incorporated the cost-to-cure figure of \$255,000 set forth by Duggins. Parent explained that "it's not economically feasible, it does not make financial sense . . . to cure the property by cutting it back and reestablishing the office, mainly because you're losing, like, 3,000 square feet of rentable area if you do that." Parent explained that under Duggins's proposed remodel, being able to rent 3,000 square feet in the Building as office/commercial space instead of as warehouse space would create an *additional* \$34,000 in capitalized value for the property. However, losing 3,000 square feet of warehouse space as part of the remodel when the Building is cut back would create a *loss* of capitalized value of \$137,000. Parent explained that it does not make sense to spend \$255,000 in construction costs to produce a *net loss* of \$103,000 in capitalized value.

Parent also criticized Tagg's conclusion that, under the sales comparison analysis, the remainder of the property would lose 35 percent of its value after the City's acquisition. Specifically, Parent explained that he did not believe that Tagg had supported his decision to choose 35 percent as the amount of diminution of value for several reasons, including that Tagg's comparison of industrial properties with and

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<sup>8</sup> Construction cost estimator Robert Boben testified on behalf of the City that it would cost \$22,693 to convert the office/commercial units to warehouse space. Parent added "an entrepreneurial incentive factor" and an amount for "contingency" to arrive at a total cost of \$26,097.

without adequate parking failed to take into account other variables between the properties.

As we have explained, the jury ultimately awarded \$235,000 in severance damages, which was much closer to Tagg's figure of \$250,141 than Parent's figure of \$52,949.

C. *The Motion for a New Trial*

After the jury's verdict, the City filed a motion for a new trial. The new trial motion was based on several grounds set forth in the statute authorizing a trial court to grant a new trial: (1) "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;" (2) "[e]xcessive . . . damages;" (3) "[i]nsufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law;" and (4) "[e]rror in law, occurring at the trial and excepted to by the party making the application." (Code Civ. Proc., § 657, subds. 1, 5, 6 & 7.)<sup>9</sup>

As a basis for the argument that an error in law and an irregularity in the proceedings had occurred, the City focused on the trial court's ruling on several pretrial motions, in which the City unsuccessfully sought to exclude certain categories of evidence. Specifically, the City had sought to exclude evidence of (1) Tagg's opinion that the Rodriguezes would lose \$5,000 in rent during construction, arguing that the damages were speculative; (2) Tagg's opinion that the value of the asphalt on the strip of

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<sup>9</sup> Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

property to be acquired by the City had a value of \$16,000, as that value was purportedly not depreciated; and (3) Tagg's and Duggins's testimony about "the cost to cure" by cutting back the Building and replacing the office/commercial units and the parking spaces. The City's new trial motion argued that these rulings were erroneous and provided the basis for a new trial.

The City also argued that the severance damages awarded by the jury were excessive and not supported by any credible evidence. The excessive damages argument focused to a large extent on the cost-to-cure estimate presented by Duggins and used by Tagg in his alternative valuation analysis. Relying on Parent's testimony, the City explained that "a reasonable buyer/investor would not spend \$255,508 to rebuild, lose 2,520 square feet of rentable space only to potentially gain \$36,000 in capitalized gross rent for office space. . . . It is doubtful [the Rodriguezes] would spend at least \$255,000 . . . of their own money, and reduce potential income by \$120,000 to rebuild their building valued at \$378,000."<sup>10</sup>

The trial court granted the new trial motion in a five-page written order. The trial court's order is somewhat unfocused in that it does not methodically evaluate each of the grounds for new trial raised by the City. However, based on our review, the trial court appears to have granted a new trial solely on the basis that the severance damages

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<sup>10</sup> To avoid confusion, we note that based on calculations and assumptions set forth by the City in its new trial motion, some of the figures stated by the City in its motion papers differed from the figures presented in Parent's trial testimony. For example, the City's motion stated the loss of square footage in the Building after Duggins's proposed remodel would result in a loss of \$120,000 in capitalized value, whereas Parent set forth a figure of \$137,000.

awarded by the jury were excessive.<sup>11</sup> As the trial court's discussion is too lengthy to set forth in its entirety, we summarize the trial court's reasoning.

First, after setting forth some procedural background, the trial court explained that Tagg's opinion that the Rodriguezes will incur \$255,141 in severance damages was based on the conclusion that the remainder of the property will lose 35 percent of its value because of the problems caused by the City's acquisition. The trial court observed that "the 35% rate was not explained," other than with a limited amount of trial testimony. The trial court then set forth a short excerpt from Tagg's testimony summarizing the entire basis for Tagg's conclusion that the value would diminish by 35 percent to show that it was not well developed. Although the trial court could have been more explicit, we understand it to have concluded that Tagg's opinion was not convincing and it did not credit that testimony.

Next, the trial court set forth Tagg's alternative valuation analysis, which Tagg based on Duggins's estimate that it would cost \$255,000 to restore the office/commercial units and the parking spaces. After accurately summarizing Tagg's analysis,<sup>12</sup> the trial

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<sup>11</sup> As the City interprets the trial court's order, the trial court granted a new trial on three grounds: (1) excessive damages, (2) insufficiency of the evidence; and (3) error in law. The Rodriguezes interpret the trial court's order as relying solely on excessive damages. Although we acknowledge the trial court's order could have been more clearly written, we believe that the Rodriguezes have the better interpretation. The trial court appears to have granted a new trial based solely on excessive damages.

<sup>12</sup> The trial court summarized Tagg's alternative valuation analysis by explaining that Tagg concluded "the value of the remainder parcel in the before condition was \$480,000.00, apparently based on the assumption that it would be worth \$734,000.00 after the 'remodel' which Mr. Tagg estimated would cost \$255,508 based on

court observed that, as a matter of law, it would not have been proper for the jury to base its severance damages award on Duggins's \$255,000 "cost to cure" figure. Specifically, the trial court explained that Duggins's estimate of \$255,000 was "not an estimated cost of repair or restoration for purposes of compensation for loss." Instead, the \$255,000 construction project was, as Duggins testified, targeted at "fulfill[ing] the desire of [the Rodriguezes] to be 'made whole' to their subjective satisfaction through the renovation of the property." The trial court explained that although the \$255,000 construction project would restore the lost office/commercial units and parking spaces, it would also cause a *net loss of income* for the property because it would result in a Building that was 2500 to 3000 square feet *smaller*.

The trial court observed that during trial, although Tagg testified that he based the severance damages figure of \$255,141 on his conclusion that the remainder of the property declined in value by 35 percent, and *not* based on the \$255,000 that it would cost to undertake Duggins's proposed remodel of the Building, counsel for the Rodriguezes had improperly argued, at times, that the jury should award approximately \$255,000 to the Rodriguezes in severance damages so that they could undertake

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Mr. Duggins's cost to cure 'rough estimate.' " Contrary to the Rodriguezes' contention in the opening brief, the trial court's summary of Tagg's analysis did not represent "plain error," and was, instead, an accurate description. As we have explained, the gist of Tagg's alternative valuation analysis is that a buyer planning to implement Duggins's proposed construction project would reasonably pay only \$480,000 for the property because it would cost the buyer \$255,000 to perform the construction, and the property would have a value of \$734,000 after the construction. Tagg testified that the results of the alternative valuation analysis showed he was "on the right track" with his 35 percent diminution in value conclusion.

Duggins's proposed construction project. The trial court's observation was accurate.<sup>13</sup> Counsel for the Rodriguezes repeatedly urged the jury to award severance damages based on how much it would cost to repair the Building as proposed by Duggins. Specifically, in opening statement counsel explained that Duggins and Tagg had concluded that the \$250,000 remodel "is necessary to make [the Rodriguezes] whole. It puts them back in the position they were in." Counsel argued, "It will be just compensation if you give them the funds to do what they want to do, what they should do to keep the building in its present use configuration." During closing argument, the Rodriguezes' counsel acknowledged Tagg's severance damages figure of \$255,141 based on the 35 percent diminution of the property, but then counsel argued that the cost to cure amount of \$255,000 was also relevant and a proper measure of severance damages in this case. Counsel argued, "So what Jim Duggins is going to be spending or will be—would be receiving with his cost of cure to do what we're talking about, demolishing the existing front area, . . . putting in parking, redoing it to make the office commercial space, that's going to cost \$250,000. So those are the severance damages based on our cost of

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<sup>13</sup> The Rodriguezes claim that the trial court's order was based on a "mistaken belief that the Rodriguezes had requested . . . damages reflective of the cost to cure their property," and that, on the contrary, they "maintained during opening statements, closing arguments, and Mr. Tagg's testimony that they were entitled to the *diminution in value* of their property—not the cost to cure." According to the Rodriguezes, the trial court's order therefore contains "plain error." We disagree. Based on the statements made by counsel for the Rodriguezes, which we detail herein, the Rodriguezes plainly asked the jury to award an amount in severance damages that would allow the Rodriguezes to be made whole by undertaking the construction project proposed by Duggins. Although Tagg himself did not advocate that the amount of severance damages be based directly on Duggins's cost to cure estimate, counsel for the Rodriguezes made that argument to the jury.



cure . . . . The other factor is you look at the evaluation of the 35 percent, you come up with the same figure. So that—that shows that our severance damages . . . it makes sense. And you're getting back—we get back to the same point we started with. What is reasonable in terms of just compensation for the Rodriguezes in this case? Is it the cure the City's proposing . . . or the cure that Jim Duggins says is reasonable and should be done, and that's going to be the remodel to give back what they—what they had to start with." Counsel argued, "You heard Jim Duggins talk about it. You heard Tagg talk about it. Put them back as much as possible in the condition they had before they started. It's not an upgrade. It's put them back where they were. Make them whole. That's what cost of cure means."<sup>14</sup>

The trial court then stated that in awarding \$235,000 in severance damages, the jury must have "accepted [the Rodriguezes'] argument that [the Rodriguezes] were to be made whole through renovation of the remainder parcel in a manner consistent with Mr. Duggins's estimate . . . so it made an award near the 35% diminution in value estimated by Mr. Tagg." The trial court concluded that "the amount of the jury

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<sup>14</sup> Counsel also pointed out the jury instruction that stated the cost of cure should be awarded as severance damages only if it is less than severance damages measured by the diminution in value of the remainder of the property due to the City's acquisition. Specifically, the instruction stated, "The cost to cure method is available only when evidence suggests that the cost of restoration does not exceed the decrease in market value of the remaining property if it is left as it stood." In this case, the cost to cure according to Duggins was claimed to be approximately \$255,000, and the diminution in value (including the \$5,000 in lost rents during construction) was claimed to be \$255,141. Thus, the jury could have concluded that the figures were essentially the same and that the jury instruction would permit them to base a severance damages award on the cost to cure figure of \$255,000.

verdict . . . is large enough that the conclusion that the jury accepted [the Rodriguezes'] 'we must be made whole' argument is ineluctable."<sup>15</sup> The trial court's holding on excessive damages is summarized in the following statement: "Spending some \$255,000.00 to demolish 2525 square feet of space that could be rented as warehouse to re-create parking so that other existing rentable space could be converted to office space rentable at almost the same rate, *at a loss of gross rents*, is excessive," and "hence does not fall within the ambit of proper damages to be awarded in an eminent domain case." (Italics added.)

The Rodriguezes appeal from the trial court's order granting a new trial.

## II.

### DISCUSSION

#### A. *Applicable Legal Standards*

We begin our discussion with a review of the legal standards governing an eminent domain action and a motion for a new trial.

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<sup>15</sup> We note, as the trial court must have realized, that it is also *possible* that the jury arrived at its \$235,000 severance damages award *solely* by crediting Tagg's opinion that the value of the remainder property would be diminished by 35 percent due to the City's acquisition, without considering or relying upon the cost to cure estimate of \$255,000. We understand the trial court to have reasonably concluded that because (1) Tagg's opinion regarding the 35 percent diminution in value lacked credibility and was not well developed, and (2) counsel for the Rodriguezes aggressively advanced the argument that the Rodriguezes should be made whole through Duggins's proposed construction project, the jury's severance damages award was likely premised, in large part, on the \$255,000 cost to cure figure.

1. *Legal Standards Applicable to Eminent Domain Proceedings*

"Article I, section 19, of the California Constitution requires that the owner whose private property is taken or damaged for a public use be paid just compensation. The federal Constitution similarly provides that private property not be taken for public use without just compensation." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 743.) By statute, the owner of private property taken by eminent domain is entitled to just compensation in the amount of the fair market value of the property taken. (§§ 1263.010, 1263.310.) "When the property taken is part of a larger parcel, in addition to being compensated for the part taken, the owner is compensated for the injury, if any, to the remainder. (§ 1263.410, subd. (a).) Compensation for injury to the remainder is the amount of the damage to the remainder, *or severance damages*, reduced by the amount of benefit to the remainder. (§ 1263.410, subd. (b).)" (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 698 (italics added).) "Severance damages 'normally are measured by comparing the fair market value of the remainder before and after the taking.' . . . The fair market value of a property is a fact to be determined by the jury. . . . 'The jury is entitled to and should consider those factors which a buyer would take into consideration in arriving at a fair market value, were [the buyer] contemplating a purchase of the property.' " (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 972, citations omitted.) " 'Severance damages are not limited to special and direct damages, but can be based on *any factor*, resulting from the project, that causes a decline in the fair market value of the property.' " (*Id.* at p. 971.)

" 'Inasmuch as the measure of damages is the decrease in market value of the land, and the trained judgment of the market in determining value would take into consideration the possibility of restoring the damaged property as far as possible to the same relative position in which it stood before the taking if the cost of such restoration would be less than the increase in market value which it would bring to the land, the condemnor is entitled to the adoption of the criterion of damage which produces the smaller result. Consequently, evidence of the cost of restoring the property as far as possible to its original relative position, when offered *by the owner*, is admissible only when there is also evidence that such cost is no greater in amount than the decrease in market value of the property if it is left as it stood." (*People By and Through Dept. of Public Works v. Hayward Bldg. Materials Co.* (1963) 213 Cal.App.2d 457, 465-466, italics added (*Hayward Bldg. Materials*).) "If the cost of such restoration ('cost to cure') is less than the diminution in market . . . , then the former, rather than the latter, will be the measure of the damage. But cost to cure is a measure of damage only when it is no greater in amount than the decrease in the market value of the property if left as it stood." (*People ex rel. Dept. of Public Works v. Flintkote Co.* (1968) 264 Cal.App.2d 97, 106.) "The rule of severance damages is clear: it is the net loss in the market value of the remainder. Costs of reconstruction constitute merely evidence bearing on such loss." (*Hayward Bldg. Materials Co.*, at p. 469.) "While cost of replacement or restoration of improvements ('cost to cure') may be relevant evidence on the issue of damages . . . it is not a measure of damages to be separately assessed without reference to the loss in fair

market value of the property taken or damaged." (*Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 Cal.App.3d 58, 65 (*Goehring*), citation omitted.)

2. *Legal Standards Applicable to a Motion for a New Trial*

As relevant here, section 657 provides, "The verdict may be vacated . . . and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: . . . 5. Excessive or inadequate damages." "A new trial shall not be granted upon the ground of . . . excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (§ 657)

"When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated." (§ 657) "On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made

only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (§ 657.)

"The normal standard of review of an order granting a new trial motion is both well established and highly deferential. A new trial motion 'is addressed to the judge's sound discretion; [the judge] is vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact; on appeal, all presumptions are in favor of the order as against the verdict, and the reviewing court will not disturb the ruling unless a manifest and unmistakable abuse of discretion is made to appear.' . . . In exercising its broad discretion, 'the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for "It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." ' "

*(Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 379 (Horsford), citations omitted.)* "In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' . . . [¶] The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' . . . Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. [¶] . . . The trial court . . . is in the best position to assess the

reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 (*Lane*), citations omitted.) "The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses. If he believes the damages awarded by the jury to be excessive and the question is presented[,] it becomes his duty to reduce them." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507 (*Seffert*).)

"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) "Conflicting evidence . . . places the new trial order beyond review so long as the conflict relates to the trial court's reasons for granting a new trial. 'An abuse of discretion [warranting reversal of a new trial order] *cannot be found* in cases in which the evidence is in conflict . . .'" (*Lane, supra*, 22 Cal.4th at p. 416.) "[S]o long as the outcome is uncertain at the close of trial—that is, so long as the evidence can support a verdict in favor of *either* party—a properly constructed new trial order is not subject to reversal on appeal." (*Id.* at p. 414.) "[O]rders

granting motions for new trial are infrequently reversed." (*Mercer v. Perez* (1968) 68 Cal.2d 104, 113.)

B. *The Trial Court Did Not Abuse Its Discretion in Granting a New Trial*

As we have explained, we understand the trial court's conclusion that the jury's severance damages award was excessive to have been based on two fundamental premises. First, the trial court concluded that Tagg's opinion that the remainder of the property would incur a 35 percent diminution in value as a result of the City's acquisition (or a decline of \$250,141) to be unconvincing and undeveloped. Second, the trial court concluded that, having rejected Tagg's 35 percent diminution in value opinion, the other possible basis for the jury award of \$235,000 in severance damages was the cost-to-cure figure of \$255,000 set forth in Duggins's testimony, representing how much it would cost the Rodriguezes to restore the office/commercial space and parking after demolishing approximately 3000 square feet of the Building. As the trial court explained, although advocated to the jury by counsel for the Rodriguezes as a basis for an award of severance damages, the cost of Duggins's proposed remodel of the Building was not a proper measure of damages and made no economic sense because it would result in a *net loss* of rental value for the Building after a \$255,000 construction project. As we will explain, the trial court did not abuse its discretion in arriving at either of its premises.

First, it was well within the trial court's discretion in ruling on a new trial motion to weigh the credibility of Tagg's valuation opinion that the remainder of the property would incur a 35 percent diminution in value and conclude that Tagg's opinion was unsupported and unconvincing. In ruling on the new trial motion, the trial court was



"vested with the authority . . . to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact." (*Horsford, supra*, 132 Cal.App.4th at p. 379). It sat " 'as an independent trier of fact' " (*Lane, supra*, 22 Cal.4th at p. 412) and "as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses." (*Seffert, supra*, 56 Cal.2d at p. 507.) Case law has long recognized that the trial court's role as a thirteenth juror extends to the issue of which expert's testimony is most convincing on the issue of the diminution in value of property in an eminent domain proceeding. (*People v. Ocean Shore R.R.* (1948) 32 Cal.2d 406, 427 [in an appeal of a new trial order in an eminent domain action, explaining "[o]n the motion for a new trial it was for the trial court to determine the weight to be given the testimony, and it was not required to accept the opinion of any witness as to value"]; *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, 347 [with respect to the trial court's evaluation of valuation experts in an eminent domain case, stating that "in ruling upon the motion for a new trial, the trial court was vested with the same powers granted a trier of fact to weigh the evidence and resolve issues of credibility"]; *Southern Cal. Edison Co. v. Gemmill* (1938) 30 Cal.App.2d 23 [upholding the grant of a new trial on the amount of severance damages in an eminent domain case when the issue was the trial court's evaluation of the valuation testimony].) Accordingly, here, the trial court was authorized to apply its own judgment as a thirteenth juror and independent trier of fact to determine that it did not credit Tagg's valuation opinion, and that it instead credited the testimony of Parent, who

explained why Tagg's analysis was flawed, and who elected instead to value the property using an income capitalization approach.

Second, the trial court properly exercised its discretion to reject the \$255,000 cost-to-cure figure, advocated by counsel for the Rodriguezes, as a basis for an award of \$235,000 in severance damages. As the parties appear to agree in their appellate briefing, the \$255,000 cost of remodeling the Building as identified by Duggins is not a proper basis for a severance damages award standing alone.<sup>16</sup> For one thing, no expert valuation witness identified the cost to remodel the Building in accordance with Duggins's estimate as a proper basis for severance damages. Instead, Duggins's construction estimate was used by Tagg only as a part of his alternative valuation analysis, in which he concluded that a buyer planning to implement Duggins's construction project would pay \$480,000 for the property after the City's acquisition. Tagg did not state that severance damages could be based on the simple approach of looking to the cost to restore the office/commercial units and the parking spaces as

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<sup>16</sup> Instead of attempting to argue that the \$255,000 in construction costs identified by Duggins would be a proper measure of severance damages, the Rodriguezes argue on appeal that the trial court was wrong to believe that the jury could have relied on that figure in awarding severance damages. Specifically, the Rodriguezes point out that Tagg did not advance the construction cost figure as a basis for severance damages and instead relied on his 35 percent diminution in value analysis. However, the Rodriguezes overlook the fact, accurately noted by the trial court in its order, that during both opening and closing arguments counsel for the Rodriguezes forcefully argued to the jury that it should award severance damages based on the cost of undertaking Duggins's construction project so that the Rodriguezes could be made whole and be allowed to reconstruct their office/commercial units and parking spaces. Based on the content of counsel's argument and other evidence at trial, we agree with the trial court that there is a reasonable possibility that the jury relied on counsel's improper argument in arriving at its severance damages award.

proposed by Duggins, and case law does not support such an approach. (*Goehring, supra*, 13 Cal.App.3d at p. 65 [cost to cure "is not a measure of damages to be separately assessed without reference to the loss in fair market value of the property taken or damaged"]; *Hayward Bldg. Materials, supra*, 213 Cal.App.2d at p. 469 [when assessing severance damages, "[c]osts of reconstruction constitute merely evidence bearing on" "net loss in the market value"].) Moreover, although the jury was instructed that the cost to cure the diminution in value to the property could be awarded as severance damages *instead* of the diminution in value *if* the cost to cure is less than diminution in value, as the trial court observed and as Parent testified, it was not economically reasonable to accept Duggins's proposed \$255,000 construction project as a means toward minimizing the loss in value to the remainder of the property. Specifically, as Parent testified, because Duggins's proposed construction project would reduce the Building's footprint by 2500 to 3000 square feet, it would result in a *net loss* of income-producing potential for the property. As the trial court reasonably pointed out, the cure proposed by Duggins would not make economic sense because "the subject property is clearly an investment property, managed for its rental returns."

In sum, we conclude that the trial court, in its role as a thirteenth juror and independent trier of fact, was within its discretion to conclude that the jury's severance damages award was excessive because (1) Tagg's opinion that the remainder of the property would decline in value by 35 percent was not credible, and (2) the only other

basis for the award, namely the \$255,000 cost to cure advocated by the Rodriguezes' counsel was not a proper basis for an award.<sup>17</sup>

#### DISPOSITION

The order is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

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<sup>17</sup> The parties' briefing also discusses other possible grounds to support the trial court's order granting a new trial, including whether there is merit to the City's argument in its new trial motion that the trial court made errors of law in its pretrial rulings. Because we conclude that the trial court's order granting a new trial is supported on the basis of excessive damages, we need not and do not consider other grounds on which the order might be affirmed.